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IN THE

Supreme Court of the United States

October Term, 1951

No.....

FRANK G. LUCERO, Administrator of the Estate of SANTIAGO G. LUCERO, Deceased,

Petitioner,
Appellee Below,

vs.

A. E. SAINDON and D. ATWOOD KNIGHT,

Respondents,
Appellants Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATED JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Frank G. Lucero, Administrator of the Estate of Santiago G. Lucero, Deceased, respectfully shows:

SUMMARY STATEMENT OF MATTER INVOLVED.

The United States Court of Appeals, Tenth Circuit, ignoring the decision of this Court in *Erie Railroad Company* vs. *Thompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, denied to the petitioner the right to have the issues of his cause decided and determined in accordance with the laws of the State of New Mexico, in his action commenced to recover damages for the wrongful death of his intestate, Santiago G. Lucero.

The Court of Appeals, contrary to the statutes of the State of New Mexico and the decisions of its supreme court interpreting, construing and applying its wrongful death statute, in reversing the judgment of the United States District Court in petitioner's favor, held that petitioner's intestate was contributorarily negligent as a matter of law and accordingly barred any recovery in petitioner's action to recover damages for his intestate's wrongful death.

Santiago G. Lucero, petitioner's intestate, died almost immediately after being struck by respondent Saindon's Cadillac automobile, being driven by respondent Knight, on a public highway in the State of New Mexico, February 27, 1950. Petitioner, as duly appointed administrator, filed an action in the New Mexico state court for his wrongful death. There being diversity of citizenship, the cause was removed by the respondents to the United States District Court. The jury was waived. After an extended trial, the District Court found from all the facts that the proximate cause of Lucero's death was the negligent operation of the respondent's automobile, that there was no contributory negligence, ascertained damages in the amount of $7,500.00, and entered judgment in petitioner's favor accordingly. Upon appeal to the Court of Appeals, that court determined that the decedent was contributorily negligent as a matter of law and entered judgment for the respondents.

The death having occurred upon a New Mexico highway, the law of New Mexico is binding upon the Court of Appeals. There being substantial evidence to support the findings of the trial judge, his decision that the proximate cause of the death was the negligence of the respondents, and his further finding that the decedent was free from any contributory negligence, should not have been disturbed by the Court of Appeals.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court to review the decision of the United States Court of Appeals, Tenth Circuit, is invoked under Title 28, U. S. C., Section 1254, for the following special and important reason:

The United States Court of Appeals, Tenth Circuit, by its decision herein in an action arising under and controlled by the law of New Mexico, has decided an important question of law in conflict with applicable and controlling decisions of the Supreme Court of New Mexico, and of this Court.

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals, Tenth Circuit, is reported in 187 Fed. 2d. 345. The case on appeal was heard by Judges Phillips, Bratton and Pickett. Within the time permitted, petitioner filed his petition for re-hearing and brief in support thereof, a true copy of said petition and brief may be found in the Record commencing at Page 93. The petition for re-hearing was denied on March 26, 1951.

QUESTION PRESENTED

The question presented is:

Whether or not the United States Court of Appeals, Tenth Circuit, in an action which arose under and was governed by the law of New Mexico, properly construed and applied decisions of the Supreme Court of New Mexico in holding that petitioner's intestate was guilty of contributory negligence as a matter of law.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

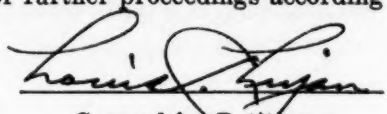
The United States Court of Appeals has decided an important question of law arising under and controlled by the law of New Mexico in a way not in accord with the applicable decisions of the Supreme Court of the State of New Mexico and this Court. In determining that petitioner's intestate was guilty of contributory negligence as a matter of law, the United States Court of Appeals, Tenth Circuit, departed substantially from every applicable decision of the Supreme Court of the State of New Mexico. If its' action be condoned by this Court, the conclusion is inescapable that, insofar as the jurisdictional limits of the Tenth Circuit are concerned, the Erie case is no longer alive.

It is therefore essential that a Writ be granted in order to determine whether the Tenth Circuit must still apply the doctrine and spirit of the Erie case. Either the Tenth Circuit is right, or the Erie case is right. So far in this cause, they are in opposition. It is submitted that this Court alone can and should determine this question.

PRAYER

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari may issue to United States Court of Appeals, Tenth Circuit, so that said cause may be reviewed

and determined by this Court and the judgment of the United States Court of Appeals, Tenth Circuit, be reversed and the cause remanded for further proceedings according to law.



Counsel for Petitioner.
Albuquerque, New Mexico.

DAVID R. GALLAGHER,
JOSEPH L. SMITH,
LORENZO A. CHAVEZ,
DON WILSON,
THOMAS E. AHERN, JR.,
Albuquerque, New Mexico.
Of Counsel.

IN THE

Supreme Court of the United States

October Term, 1951

No.....

FRANK G. LUCERO, Administrator of the Estate of SANTIAGO G. LUCERO, Deceased,

Petitioner,

vs.

A. E. SAINDON and D. ATWOOD KNIGHT,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals, Tenth Circuit, dated February 21, 1951, is reported at 187 F. 2d., 345.

GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS INVOKED

The judgment of the United States Court of Appeals, Tenth Circuit, was made and entered on the 21st day of February, 1951, a petition for re-hearing was denied, March 26, 1951. The jurisdiction of the Supreme Court of the United States is invoked under Title 28, U. S. C. Section 1254.

STATEMENT OF THE CASE

The law suit began in the state court of Socorro County, New Mexico, under the provisions of the New Mexico wrongful death statute, plaintiff, petitioner here, being Lucero's duly appointed administrator. There being diversity of citizenship between the parties, it was thereafter properly removed by the respondents to United States District Court for the District of New Mexico. The jury being waived, a trial was held before the court which found that the cause of the death was the negligent operation of respondent's automobile. Judgment for petitioner in the amount of $7,500.00 was accordingly entered. Upon appeal to the Court of Appeals, Tenth Circuit, this judgment was reversed on the single ground that petitioner's intestate was contributorily negligent as a matter of law. Judgment by that court was entered for the respondents.

About 7:30 P. M., May 27, 1950, Lucero was struck by respondent's Cadillac automobile while walking on a public highway approximately fifteen miles north of the small town of Socorro, New Mexico. Almost immediately thereafter he died. There is no question here as to the negligence of the respondents, both the trial court (Conclusion of Law No. 7, R. 18), and the Court of Appeals (Opinion of Court of Appeals, R. 86), were in accord that there had been negligent operation of their automobile. The single issue is whether or not Lucero was so contributorily negligent as to bar any recovery by his administrator.

Naturally, there was some disparity in the evidence as to just what happened at the time of the accident, hardly unusual in a tort case. Lucero was walking on the highway. It was dark. Respondent Saindon, the owner-passenger, testified that although he was watching the road (R. 29) he never saw Lucero until the car, traveling 45 miles per hour (R. 31), was about four or five feet from him (R. 29). At which time,

respondent Knight, the driver, exclaimed "My God" and swerved the car (R. 30). Respondent Knight testified he first saw Lucero approximately forty feet away (R. 37) at which time he applied his brakes (R. 37), skidded forward and struck Lucero (R. 37-38).

At the conclusion of the testimony the United States District Judge observed:

> "The only negligence attributable to the deceased so far as the evidence discloses is the fact that he was on the highway. I know of no law or rule of law that denies the pedestrian the right to be on the public highways of the state." (R. 82).

As to the question of respondent's negligence:

> "From all the facts I shall find the proximate cause of the accident was the negligence of the defendant in so operating their automobile at such a rate of speed or under such a condition that they were not able to discern a human being more than forty feet away." (R. 83).

SPECIFICATION OF ERROR

The United States Court of Appeals, Tenth Circuit, in holding that petitioner's intestate was guilty of contributory negligence as a matter of law, erred by refusing to follow and apply the law of the State of New Mexico as declared and established by its highest court.

ARGUMENT

POINT A

The Law of New Mexico is Controlling Here

The action being in tort and tried in the court below on the single ground of diversity of citizenship, the local law

of New Mexico must be applied. *Erie Railroad Company* vs. *Thompkins*, 304 U. S. 64 58 S. Ct. 817, 82 L. Ed. 1188 (1938). In such a case, the Court of Appeals sits as the supreme court of the state. *Wichita Royalty Company* vs. *City National Bank*, 306 U. S. 103, 59 S. Ct. 420, 83 L. Ed. 515 (1939). Accordingly, the Court of Appeals should have applied New Mexico decisions in determining the question of contributory negligence. *Palmer* vs. *Hoffman*, 318 U. S. 109, 63 S. Ct. 477, 87 L. Ed. 645 (1943).

Point B

Under New Mexico Law, Petitioner's Intestate Was Not Guilty of Contributory Negligence as a Matter of Law

Annexed to this Brief is an Appendix digesting every decision of the Supreme Court of New Mexico, as far as our research has disclosed, involving a highway accident wherein contributory negligence was raised as a defense. This list discloses that in such cases, whether they be automobile collision, automobile-pedestrian collisions, automobile-wagon collisions or automobile-motorcycle collisions, the highest court in New Mexico, on the evidence, has never amended or otherwise reversed a holding of a trial court, be it by judge or jury, that the plaintiff was free from contributory negligence.

New Mexico has always taken scrupulous care to recognize the position of the *trier of the facts*, whether it be judge or jury, and their exclusive opportunity to hear the testimony and observe the witnesses. As we have mentioned, the highest court in New Mexico, in a highway case, has never changed a court or jury holding that plaintiff was free from contributory negligence. The most recent expression of the New Mexico law is the case of *Cooper* vs. *Brenneman*, ... N. M. ...., 230 P. 2d. 974, (April 27, 1951). In this collision case involving two automobiles the court said:

"The sole questions raised by the appeal are the sufficiency of the evidence to sustain the findings and the contention that the evidence conclusively shows the plaintiff was guilty of contributory negligence. . . .

It is not enough that if we were passing on the cold record, we might have reached a different result. The question for us is whether there is substantial evidence to support the findings . . . these . . . cases often present difficult questions but . . . they must be largely left to the fact finder who sees and hears the witnesses."

(230 P. 2d. 974, 975)

In usurping this exclusive position of the fact finder, the Court of Appeals has made a decision that is contrary to New Mexico law.

Nor would the New Mexico court agree with the federal court under the facts of this particular case.

In New Mexico, the legislature has declared the law and policy of the state as to the use of its highways by automobiles and pedestrians as follows:

"The driver of any vehicle in or upon public highways . . . shall drive or operate . . . in a careful manner, *with due regard for safety and convenience of pedestrians and all other vehicles or traffic upon such highways.*"

NMSA 1941 Comp. 68-501 (a)

(All emphasis in this Brief has been supplied.)

With particular regard to the factual situation of this tragedy, NMSA 1941 Comp. 68-719 (d) and 68-613 (a), requires that automobile lights must be of such a standard as to disclose a person 100 feet away and each car must have a horn audible at a distance of not less than 200 feet.

There is no question here that Lucero, petitioner's intestate, was lawfully on the highway. His right was at least equal to that of respondents.

> "In New Mexico, *the main highways are not exclusively reserved for motorists.* The pedestrian can be seen trudging along or across a highway to his destination without deeming himself a trespasser. The narrow wheeled wagons of the mountaineer drawn by pinto ponies vie with the lowly burros loaded with their burden of firewood for a place on the macadam or concrete road. *For all these the motorist must and often does turn aside or stop to avoid a collision.*" *Russell* vs. *Davis*, 38 N. M. 533, 37 P. 2d. 536, 538, (1934).

There is also no question that respondent Saindon, though watching the road, never saw Lucero until he was four or five feet away (R. 29) while even the driver, at the time of trial, testified that he was a mere forty feet away when he first saw him (R. 37).

These are the basic facts, and from them, the district judge, he alone having the opportunity to observe and hear the witnesses, properly deduced certain inferences, and in particular, excessive speed:

> "I do very much doubt whether they [the respondents] were driving not more than 45 miles an hour (R. 82).... If they were not driving more than 45 miles an hour, they could have easily avoided striking that man if they had seen him as much even as 40 feet away." (R. 83).

We submit that even if the Court of Appeals weighed the evidence in favor of the appellants—which it should not do —at the very least a factual situation was presented upon which reasonable men could properly differ. In such a case, the trial judge's decision must never be disturbed.

> "The matter of contributory negligence ... was a question of fact to be determined by a jury, or by the Court in the absence of a jury as in this case. This is the rule in New Mexico and too well settled to require citation of authority." *Duncan* vs. *Madrid*, 44 N. M. 249, 101 P. 2d. 382, 385, (1940).

In *Russell* vs. *Davis*, supra, a pedestrian was killed by an automobile. As against a plea of contributory negligence, a judgment of the trial court holding the driver liable, was unanimously affirmed.

> "Where reasonable men may fairly differ upon the question as to whether there was contributory negligence or not, the determination of the fact is for the jury." 37 P. 2d. 536, 539.

More recently, the doctrine has been re-stated:

> "Consequently, the facts thus found, are the facts to be reviewed, and if supported by substantial evidence, the findings must be sustained. . . . If reasonable men all agree, or if they may fairly differ, as to whether the evidence establishes such facts, then it is substantial." *Brown* vs. *Cobb*, 53 N. M. 169, 204 P. 2d. 264, 266, (1949).

Griego vs. *Conwell*, 54 N. M. 287, 222 P. 2d. 606 (1950) is possibly the most recent decision of the highest court of New Mexico pertaining to a highway death. It establishes with absolute certainty that the matter at bar would have been determined by the New Mexico court exactly opposite to the judgment of the Court of Appeals.

> "The accident occurred shortly before midnight. Griego had parked his car on the right-hand side of the blacktop with the headlights burning. The center line of the blacktop was not marked. One witness testified that the left hand side of the car was approximately three feet from the center line while another put it at or very near the center.
>
> Conwell and his wife had attended a cocktail party at LaFonda in Santa Fe from 7:30 to 8:30 P. M., and had then eaten at a banquet in the same city. They left for Albuquerque at about 10:30 or 10:45 P. M. Conwell testified that as he approached the place of the accident

he saw the Griego car was parked; that he was blinded by its lights, and as he ran through these lights he saw Griego in the road but that he could not then avoid striking him. Griego's body was found about 36 feet south and east of his car. A flashlight was found near the body. The left front fender and the radiator of the Conwell car were crushed backward, and testimony was given that there was a fresh dent or mark on the left rear fender of the Griego car that was not there before he drove the car to work that afternoon.

Tests for alcohol were made of blood taken from Conwell and the Griego body within a little more than an hour after the accident. The tests showed Conwell's blood to be free of alcohol but Griego's blood showed 160 milligrams of alcohol, ten more than enough to show intoxication. Conwell admitted that he drank three highballs at the cocktail party and the medical testimony was to the effect that while there are exceptions in individuals, ordinarily it takes from ten to twelve hours for alcohol to leave the bloodstream of a person."

(222 P. 2d. 606, 607)

In the appeal of that case, Conwell argued:

"... That there was no valid reason why Griego could not have easily seen the approaching Conwell car and stayed out of its way instead of standing or walking on the pavement behind his lights and in line of travel of the Conwell car."

(222 P. 2d. 606, 608)

But the New Mexico court, in a unanimous opinion, affirmed the judgment for Griego's administrator:

"After a careful consideration of the record in this case, we are unable to say, taking into consideration the presumption of due care on the part of Griego, that the appellants established as a matter of law that Griego was guilty of negligence, which proximately contributed to the accident resulting in his death, and that we should overturn the verdict of the jury on that point."

(222 P. 2d. 606, 608)

We submit:

If Griego, who was meandering on a highway obviously drunk, is entitled to recover in New Mexico—certainly the petitioner here is entitled to have the verdict of the trial judge left undisturbed.

In this Brief we have endeavored to quote basic New Mexico law without imposing on the attention of this Court by endless citations. All the cases are in the Appendix. The justices' words are different, the law, in comparable factual situations, is the same.

What did the Court of Appeals do to reach its result?

1. It cited no New Mexico case involving a highway accident wherein a judge's finding or a jury verdict declaring plaintiff free from contributory negligence was reversed. Actually no such decision exists.

2. It obviously weighed the facts in favor of the appellant —exactly what it should not do.

> "The case turns on the sufficiency of the evidence to support the findings. The evidence must be considered in an aspect *most favorable to appellees* and all evidence to the contrary must be disregarded. Indeed for our consideration all evidence to the contrary is presumed to be untrue." *Brown* vs. *Cobb*, supra. (204 P. 2d. 264, 266)

(a) In its opinion the Court of Appeals (R. 86) stated the speed of the automobile to be between 45 and 50 miles an hour. The trial judge inferred a much greater speed (R. 82), and made a formal Finding (No. 6) of excessive speed (R. 15) and not under the driver's control (No. 8) (R. 16), and that the driver could have avoided the accident (No. 8 and 9) (R. 16).

(b) The Court of Appeals approached the case with the feeling that a pedestrian in New Mexico crosses a highway at his peril:

> "Danger should have been expected [by Lucero] from cars approaching from either direction, and it

was the duty of the deceased to look in both directions for approaching automobiles before entering upon the main travelled highway. . . ." (Court of Appeals — R. 87-88).

The law of New Mexico is to the contrary:

"The appellant, as a driver of an automobile, is bound to anticipate that he may meet pedestrians on the highway. He must so operate his car as to prevent injuring them if in the exercise of due care on his part it is possible to do so." *Russell* vs. *Davis*, supra. (37 P. 2d. 536, 539)

The trial judge found as a fact that, if the car had been operated properly, the accident would have been avoidable (R. 16).

In an endeavor to make this Brief in support of the Writ *brief*, we do not touch on other aspects of the Court of Appeals decision which portray an entirely different factual situation than that concluded by the trial judge. Suffice it is to say that there was a conflict, that reasonable men *could* differ and accordingly the trial judge's findings should have been affirmed.

If the decision of the Court of Appeals does not depart from the doctrine of the Erie case, frankly, we are puzzled as to whether the Erie case applies in a wrongful death action.

There is, moreover, nothing extreme about the New Mexico law, the functions of a court and jury, and the conclusions to be given to their findings. Compare *Wilkerson* vs. *McCarthy*, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497 (1949). *Jones* vs. *East Tennessee V & G. R. Co.*, 128 U. S. 443, 9 S. Ct. 118, 32 L. Ed. 478 (1888). Are not Justice Cardozo's remarks pertinent here?

> "In default of the guide of customary conduct what is suitable for the traveler caught in a mesh where the ordinary safeguards fail him is for the judgment of a jury." *Pokora* vs. *Wabash Railroad Company*, 292 U. S. 98, 54 S. Ct. 580, 78 L. Ed. 1149.

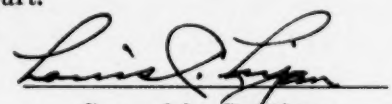
We trust this Court realizes that it has been with trepidation that we impose a $7,500.00 verdict on its docket, but in many regions of New Mexico, including where this tragedy occurred, $7,500.00 is a considerable sum. And has dollars and cents ever determined our justice?

The issue here is whether the Erie Case applies in the Tenth Circuit. Certiorari is needed to reestablish that fact.

CONCLUSION

It is respectfully submitted that a Writ of Certiorari should be granted in order for this Court to review the record and the opinion of the United States Court of Appeals, Tenth Circuit, reverse the same, and reestablish the decision of the District Court.

Respectfully submitted,



Counsel for Petitioner.
Sunshine Building,
Albuquerque, New Mexico.

David R. Gallagher,
Joseph L. Smith,
Lorenzo A. Chavez,
Don Wilson,
Thomas E. Ahern, Jr.,
Sunshine Building,
Albuquerque, New Mexico,
Of Counsel.

APPENDIX

We digest here every New Mexico decision pertaining to a highway accident wherein either the appellant argued contributory negligence as a matter of law in order to secure a reversal, or where an effort was made to reverse a directed verdict for the defendant on the ground of contributory negligence.

I.

Automobile—Pedestrian

Gray vs. *Esslinger*, 46 N. M. 421, 130 P. 2d. 24 (1942), directed verdict defendant—*reversed*—wrongful death.

Griego vs. *Conwell*, 54 N. M. 287, 222 P. 2d. 606 (1950), verdict for plaintiff—*affirmed*—wrongful death.

Haire vs. *Brooks*, 42 N. M. 634, 83 P. 2d. 980, directed verdict for defendant—*affirmed*—wrongful death.

Lopez vs. *Townsend*, 42 N. M. 601, 82 P. 2d. 921(1938), verdict for plaintiff—*affirmed*—wrongful death.

Lucero vs. *Harshley*, 50 N. M. 1, 165 P. 2d. 587 (1946), verdict for plaintiff—*affirmed*—wrongful death.

Russell vs. *Davis*, 38 N. M. 533, 37 P. 2d. 536 (1934), verdict for plaintiff—*affirmed*—wrongful death.

II.

Automobile Collisions

Bunton vs. *Hull*, 51 N. M. 5, 177 P. 2d. 168 (1947), verdict for defendant—*affirmed.*

Chavez vs. *Worley*, 48 N. M. 449, 152 P. 2d. 393 (1944), verdict for plaintiff—*affirmed.*

Cooper vs. *Brenneman*, . . . N. M. . . ., 230 P. 2d. 974 (1951), verdict (Court) for plaintiff—*affirmed.*

Duncan vs. *Madrid*, 44 N. M. 249, 101 P. 2d. 382 (1940), verdict for plaintiff—*affirmed.*

Greenfield vs. *Bruskas*, 41 N. M. 346, 68 P. 2d. 921 (1937), verdict for defendant—*reversed.*

Hisaw vs. *Hendrix*, 54 N. M. 119, 215 P. 2d. 598 (1950), verdict for plaintiff—*affirmed.*

Langenegger vs. *McNally*, 50 N. M. 96, 171 P. 2d. 316 (1946), directed verdict for defendant—*affirmed.*

Mayfield vs. *Crowdus*, 38 N. M. 471, 35 P. 2d. 291 (1934), verdict for plaintiff—*affirmed.*

Miller vs. *Marsh*, 53 N. M. 5, 201 P. 2d. 341 (1949), verdict for plaintiff—*affirmed.*

Mozley vs. *Rinehart*, 35 N. M. 164, 291 Pac. 294 (1930), verdict for plaintiff—*affirmed.*

Olguin vs. *Thygesen*, 47 N. M. 377, 143 P. 2d. 585 (1943), verdict for plaintiff—*affirmed.*

Schoen vs. *Schroeder*, 53 N. M. 1, 200 P. 2d. 1021 (1949), verdict (Court) for plaintiff—*affirmed.*

Silva vs. *Waldie*, 42 N. M. 514, 82 P. 2d. 282 (1938), verdict for plaintiff—*affirmed.*

Stalcup vs. *Ruzic*, 51 N. M. 377, 185 P. 2d. 298 (1947), verdict for plaintiff—*affirmed.*

Turrieta vs. *Wyche*, 54 N. M. 5, 212 P. 2d. 1041 (1949), verdict for plaintiff—*affirmed.*

White vs. *Montoya*, 46 N. M. 241, 126 P. 2d. 471 (1942), verdict for plaintiff—*affirmed.* (automobile-motorcycle collision.)

Williams vs. *Haas*, 52 N. M. 9, 189 P. 2d. 632 (1948), directed verdict for defendant—*reversed.*

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Petitioner,

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A. E. SAINDON and D. ATWOOD KNIGHT,

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JAMES R. MODRALL,
Counsel for Respondents

VANCE MAUPIN
Of Counsel.

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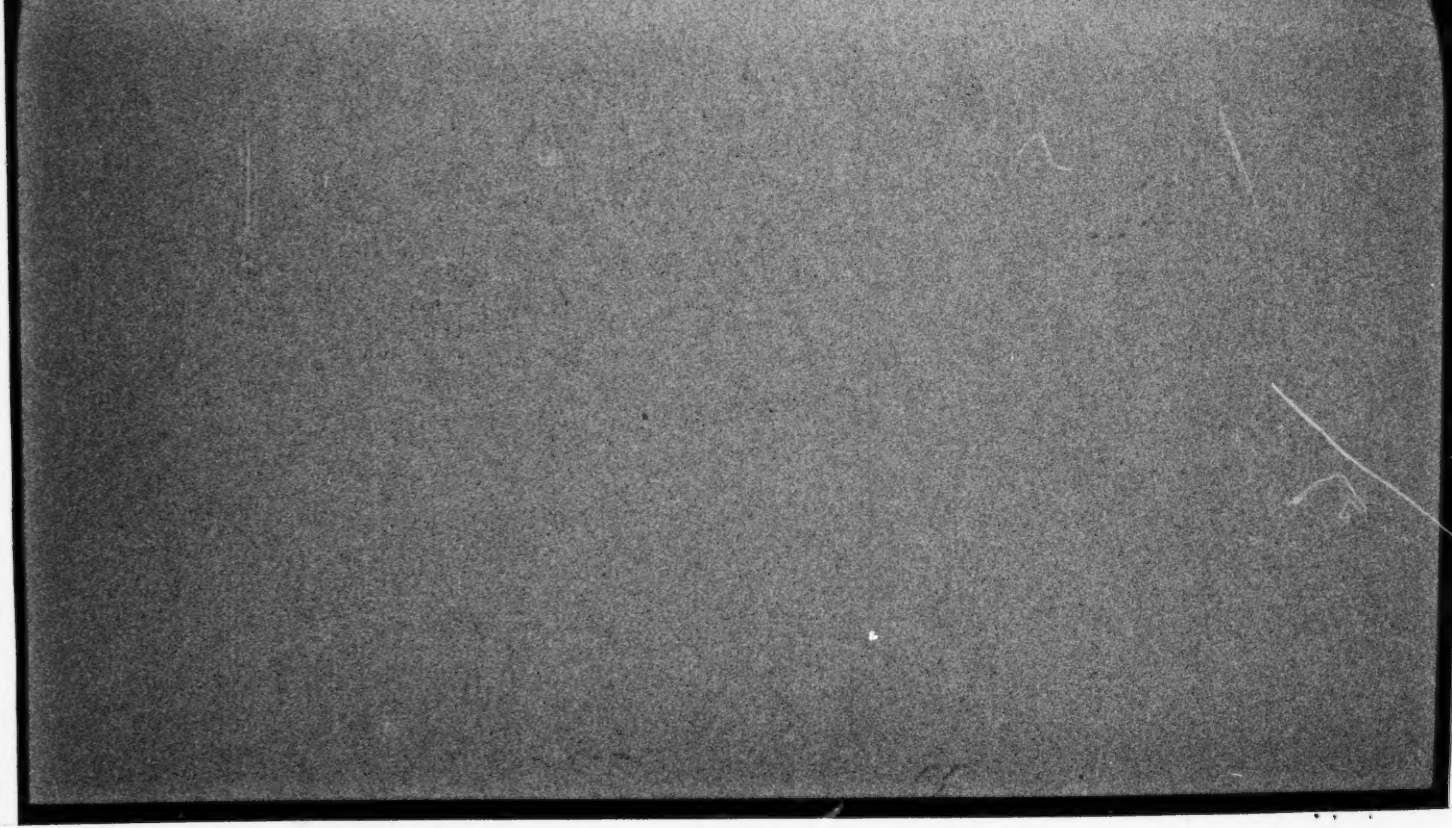

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IN THE

Supreme Court of the United States

October Term, 1951

No.....

FRANK G. LUCERO, Administrator of the Estate of SANTIAGO G. LUCERO, Deceased,

Petitioner,

vs.

A. E. SAINDON and D. ATWOOD KNIGHT,

Respondents.

BRIEF AND RESPONSE TO PETITION FOR WRIT OF CERTIORARI

BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

Deeming it necessary, the Respondents, pursuant to Paragraph 4 of Rule 27 of this Court, respectfully restates the case for the following reason:

Petitioner has filed a Statement of the Case herein in their Brief in support of the Petition for Writ of Certiorari, which is so brief in its content that it is difficult for this Court, without searching the entire record, to determine the actual facts, and all of the facts upon which the United

States Court of Appeals, Tenth Circuit, made its final determination of the case.

The Respondents here feel that a chronological statement of all the material facts on file in the case will assist the Court and eliminate the necessity of a search of the entire record to ascertain the true facts involved.

At about 7:30 in the evening of February 27, 1950, seventy-seven-year-old Santiago D. Lucero, while walking upon U. S. Highway 85, approximately fifteen miles north of Socorro, New Mexico, was struck and killed by an automobile owned by the defendant Saindon and driven by the defendant, Knight. This action was brought in the District Court of Socorro County, New Mexico, by the administrator of the estate of the deceased, to recover damages for his death under the New Mexico Wrongful Death Act and was subsequently removed to the United States District Court for that District where it was tried to the Court without a jury. The Court found that the defendants were guilty of negligence and that the deceased was free from contributory negligence. Judgment was awarded in favor of the plaintiff for the sum of $7,500.00, the Court refusing to allow punitive damages as sued for in the amount of $5,000.00. Appeal was then taken from that judgment to the United States Court of Appeals, Tenth Circuit. The Court of Appeals reversed the decision of the trial court on the sole ground that the acts of the deceased were, as a matter of law, such as would make him contributorily negligent and therefore, bar his recovery.

At the time and place of the collision, the Saindon automobile was being driven in a southerly direction (R-27) at a speed of 45 to 50 miles per hour (R-31, 35, 40) and was about to meet and pass another automobile traveling in a northerly direction. (R-36, 31) It was a dark night and automobile lights were necessary. (R-31) Both drivers had dimmed their lights when they were some distance apart. (R-31)

The defendant, and driver, Knight, stated that he saw the deceased some forty or fifty feet ahead of the car at first. At that time deceased was in the middle of the road almost on the yellow line. (R-41) Knight immediately applied his brakes and began swerving the car and the car slid forward and sheared to the right. (R-42)

The driver of the north-bound automobile approaching defendant from the south noticed the deceased about five feet to the west of the center line just prior to the collision. (R-70) When the brakes of defendant's automobile were applied the deceased glanced over his shoulder toward the Saindon car and took two or three steps directly in front of it. (R-42) The defendant, Knight, testified that except for the movement by the deceased he might have missed him. (R-42, 44)

The highway at the point where the accident occurred, was in the open country (R-34, 54) and the nearest houses were in a small settlement of twenty or twenty-five houses at least a quarter of a mile away from the scene of the collision. (R-58) There were no visible lights in this vicinity nor any houses near the accident nor abutting upon the highway at the scene. (R-34, 40) There was evidence that the deceased was wearing dark clothing, a dark gray coat, jacket and khaki trousers (R-39), which caused him to blend in with the background so that there was no contrast between the clothing worn by the deceased and the general surroundings. (R-71)

The testimony in the case is substantially, and for the most part insofar as is material to this Petition, uncontradicted inasmuch as there were no actual eye witnesses to the collision except the defendants and the witness, Max J. Burchett, who was driving the automobile which met defendant's automobile just immediately prior to the impact and approaching from the south, and of course, deceased himself.

ARGUMENT AND AUTHORITIES

At the outset, Respondents specifically concur with Petitioner in the point he makes that there is no question raised by this Petition other than the single issue of whether or not the deceased, Santiago D. Lucero, was negligent so as to bar any recovery by his administrator under the Wrongful Death Act of New Mexico. Respondents would further point out that this question is one almost entirely of fact and becomes a question of law only where the trier of fact and all reasonable men could not possibly differ upon the conclusion to be drawn from all of the facts. It is then, in essence, this question of fact which is being presented to the Court upon this Petition for a Writ of Certiorari, namely, whether or not under the fact situation here, all reasonable men could agree that deceased was negligent.

POINT A

The Law of New Mexico Is Controlling Here

Under this point, Petitioner says that the Court of Appeals should have applied New Mexico decisions in determining the question of contributory negligence. Respondents can but agree that this is the true rule but, contrary to Petitioner's contention, assert that the United States Court of Appeals did follow the law as it was originally laid down by this Court in the case of *Erie Railroad Company vs. Thompkins,* 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817. Furthermore, the Court of Appeals followed the law as it has been determined by the highest court of the State of New Mexico insofar as that Court has resolved and determined a rule of law which is applicable to the question raised by this Petition.

Point B

Under New Mexico Law, Petitioners Intestate Was Not Guilty of Contributory Negligence as a Matter of Law

Petitioner has methodically and with apparent sincerity, set forth, in digest form, an appendix at page 17 and 18 of his Petition and Brief in which he explains he is "digesting every decision of the Supreme Court of New Mexico, as far as our research has disclosed, involving a highway accident wherein contributory negligence was raised as a defense." Respondent has examined all of these cases and wishes to rearrange them in separate categories so as to completely apprize the Court of the true import of these decisions without the necessity of the Court examining and analyzing them individually.

1. Those cases in which the question of contributory negligence was not raised by the appeal, was not discussed by the court nor has it any application whatsoever to the case.

Bunton vs. Hull, 41 N. M. 5, 177 P 2nd 168 (1947)
Greenfield vs. Bruskas, 41 N. M. 346, 68 P 2d 921 (1937)
White vs. Montoya, 46 N. M. 241, 126 P 2d 471 (1942)
Gray vs. Esslinger, 46 N. M. 421, 130 P 2d 24 (1942)

In this latter case, contributory negligence was only discussed insofar as whether or not it may be considered and is a defense where the plaintiff's acts are such as constitute willful or wanton negligence.

Stalcup vs. Ruzic, 51 N. M. 377, 185 P 2d 298 (1947)

In this case, contributory negligence had no application because the question raised is whether or not the acts of the plaintiff were willful, wanton or with reckless disregard of the rights of others and therefore come within the "Guest Statute" of New Mexico.

2. Those cases in which the court recognizes the general

rule that where the facts are such that all reasonable men must draw the same conclusion from them then the question of contributory negligence is a question of law and for the court to decide rather than the jury, however, the New Mexico court then goes on to decide in each of these cases that under the particular facts of the instant case it could not say, as a matter of law, that the plaintiff was negligent so as to bar his recovery.

Mayfield vs. Crowdus, 38 N. M. 471, 35 P 2nd 291
Russell vs. Davis, 38 N. M. 533, 37 P 2nd 536
Olguin vs. Thygesen, 47 N. M. 377, 143 P 2nd 585
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Lucero vs. Harshey, 50 N. M. 1, 165 P 2nd 587
Schoen vs. Schroeder, 53 N. M. 1, 200 P 2nd 1021
Duncan vs. Madrid, 44 N. M. 249, 101 P 2nd 382
Silva vs. Waldie, 42 N. M. 514, 82 P 2nd 282
Lopez vs. Townsend, 42 N. M. 601, 82 P 2nd 921

3. Those cases that hold that the facts in evidence substantiate the finding of fact by the court or the verdict of the jury and apply the general principle of law that the court will not overturn the findings of fact of the court or the verdict of the jury if there is substantial evidence in the record to sustain same, but have no application to the real question raised by this Petition:

Miller vs. Marsh, 53 N. M. 5, 201 P 2nd 341
Chavez vs. Worley, 48 N. M. 449, 152 P 2nd 393

4. Those cases where the court applies the general rule of law that where all reasonable minds must conclude that under the facts of the case the plaintiff was negligent then he will be denied recovery because of his contributory negligence.

Haire vs. Brooks, 42 N. M. 634, 83 P 2nd 980
Langenegger vs. McNally, 50 N. M. 96, 171 P 2nd 316

In both of the cases last above cited the Supreme Court of New Mexico sustained the trial court's conclusion of law that the plaintiff was barred from recovery as a matter of law because of his own negligence.

Mozley vs. Rinehart, 35 N. M. 164, 291 Pac. 294, *where the court held as a matter of law that it is not negligence on the part of the plaintiff which will bar his recovery if he violates a traffic ordinance, the violation of which was caused by the negligence of the defendant.*

It is of interest to note that in the three cases last above cited, the Supreme Court of New Mexico applied the general rule of law which Petitioner here claims is not the law in New Mexico and which he alleges the Court of Appeals of the Tenth Circuit refused to follow.

5. Those cases where the actual facts upon which the Supreme Court of New Mexico based its determination that plaintiff was not guilty of contributory negligence as a matter of law are not set out in the opinion so that the case is of no value here: *Cooper vs. Brenneman, et ux.,* 230 P 2nd 974, .. N. M. ...

Upon examination of Petitioner's Brief it readily appears that Petitioner has adopted a theory that the Court of Appeals refused to follow the law in New Mexico which Petitioner claims is "that contributory negligence may never be determined as a matter of law", however, careful examination, the cases cited by Petitioner in his brief discloses that they actually sustain a determination by the New Mexico Supreme Court that the law in New Mexico is the same as it is in many other jurisdictions, namely, that contributory negligence may be resolved as a matter of law by the court when the facts are such that all reasonable men would conclude from those facts that the plaintiff was negligent. See *District of Columbia vs. Moulton,* 182 U.S. 576, 54 L. Ed. 1237, 215 Ct. 840; *Law vs. Saks,* 241 Ala. 37, 150

2nd 28; *Betschant vs. Steel,* 61 Cal. App. 2nd 517, 143 P 2nd 81; *Traylor vs. Atlantic Greyhound Lines,* 166 Va. 295, 184 S. E. 188; *Johnson vs. Burrham,* 198 Wash. 500, 88 P 2nd 833, 38 Am. Jur. 1049, Sec. 345 and cases cited from twenty-six jurisdictions. *Mayfield vs. Crowdus,* 38 N. M. 471, 35 P 2nd 291; *Russell vs. Davis,* 38 N. M. 533, 37 P 2nd 536; *Olguin vs. Thygesen,* 47 N. M. 377, 143 P 2nd 585; *Turrieta vs. Wyche,* 54 N. M. 5, 212 P 2nd 598; *Hisaw vs. Hendrix,* 54 N. M. 119, 215 P 2nd 598; *Griego vs. Conwell,* 54 N. M. 287, 222 P 2nd 606; *Lucero vs. Harshey,* 50 N. M. 1, 165 P 2nd 587; *Schoen vs. Schroeder,* 53 N. M. 1, 200 P 2nd 1021; *Duncan vs. Madrid,* 44 N. M. 249, 101 P 2nd 382; *Silva vs. Waldie,* 42 N. M. 514, 82 P 2nd 282; *Lopez vs. Townsend,* 42 N. M. 601, 82 P 2nd 921. What the cases in New Mexico do sustain is that the Supreme Court of that State has never found a case where the facts were such that it deemed it advisable to reverse the trial court or set aside the verdict of the jury on the theory that all reasonable men could not differ upon the question of whether or not the plaintiff was negligent and was therefore guilty of contributory negligence which barred his recovery. At no time, as Petitioner would have the Court believe, as is set at page 10 of Petitioner's supporting brief, has the Supreme Court of New Mexico ever indicated or held that the question of negligence is *always* one of fact for the jury, and that *never,* under any circumstances, can the Court determine, as a matter of law, that plaintiff is guilty of negligence so that he is barred from recovery. Petitioner's statement, set out at page 10 of his supporting brief, as follows:

> "Nor would the New Mexico court agree with the Federal Court under the facts of this particular case."

is, of course, nothing more than a bald-faced conclusion of Petitioner based upon pure conjecture with no foundation whatsoever. The facts of this case have never been pre-

sented to the New Mexico Court for its determination and it is impossible to speculate as to what the determination might be. Respondents feel it too well settled a proposition to cite authority that what is ordinary care must depend upon the facts and circumstances of each individual case.

Petitioner cites *Griego vs. Conwell,* 54 N. M. 287, 222 P 2nd 606 (1950) for the proposition that the New Mexico Court "with absolute certainty" would have determined the facts of the case at bar exactly opposite to that of the U. S. Court of Appeals for the Tenth Circuit. This cannot positively be stated unless certain distinguishing facts in the two cases are to be completely ignored.

In the Griego case, the exact location of the collision is not indicated in the Court's opinion, however, it pointed out that deceased worked at the Santa Fe Shops which are within the confines of the City of Albuquerque, New Mexico, so that it is safe to presume that the collision occurred within the City, where pedestrians are accustomed to crossing the highway at night, and where vehicular traffic is regulated by reduced speed limits. In the case at bar, the collision occurred in the open country where pedestrians are less accustomed to cross and should be more cautious of vehicles moving at fast rates of speed. In the Griego case, a flashlight was found near deceased's body indicating that he was carrying a light to warn motorists of his presence whereas deceased in the case at bar was wearing dark clothes and had no warning light of any sort. There may be other distinguishing facts in the record of the Griego case not evidenced by the Court's opinion which would cause the same Court to hold differently in determining the two cases.

Petitioner asserts, in support of his Petition, at pages 14 and 15 of his Brief, the errors to which the U. S. Court of Appeals must lay claim and to which this Court will fall heir unless the Writ is allowed and the case reversed.

"1. It cited no New Mexico case involving a highway accident wherein a judge's finding or a jury verdict declaring plaintiff free from contributory negligence was reversed. Actually no such decision exists."

It is but pure folly to believe merely because no fact situation presented to the Supreme Court of the State of New Mexico to date, where the question of contributory negligence as a matter of law was raised by the parties, was such that the New Mexico Court could not hold that the decision of the lower court or the verdict of the jury should be reversed, that such a situation will never arise. And it is even greater folly to be led into the belief that because the above has never occurred, that the law of New Mexico is any different than it is in many other jurisdictions, to wit, that where reasonable men may not differ upon examination of all the facts of the case as to whether or not the plaintiff was guilty of contributory negligence, then the Court will determine this question as a matter of law. This is particularly true in the light of the decisions of the New Mexico Court which recognize the general rule. See *Mozley vs. Rinehart,* 35 N. M. 164, 291 Pac. 294; *Haire vs. Brooks,* 42 N. M. 634, 83 P 2nd 980; *Langenegger vs. McNally,* 50 N. M. 96, 171 P 2nd 316; *Mayfield vs. Crowdus,* 38 N. M. 471, 35 P 2nd 291; *Russell vs. Davis,* 38 N. M. 533, 37 P 2nd 536; *Olguin vs. Thygesen,* 47 N. M. 377, 143 P 2nd 585; *Turrieta vs. Wyche,* 54 N. M. 5, 212 P 2nd 1041; *Hisaw vs. Hendrix,* 54 N. M. 119, 215 P 2nd 598; *Griego vs. Conwell,* 54 N. M. 287, 222 P 2nd 606; *Lucero vs. Harshey,* 50 N. M. 1, 165 P 2nd 587; *Schoen vs. Schroeder,* 53 N. M. 1, 200 P 2nd 1021; *Duncan vs. Madrid,* 44 N. M. 249, 101 P 2nd 382; *Silva vs. Waldie,* 42 N. M. 514, 82 P 2nd 282; *Lopez vs. Townsend,* 42 N. M. 601, 82 P 2nd 921.

"2 It obviously weighed the facts in favor of the appellant—exactly what it should not do."

For and in support of this abstract conclusion, Petitioner cites no authority. Petitioner does cite authority for the proposition that when the question of the sufficiency of the evidence to support findings of fact is in question, then the evidence must be considered in an aspect most favorable to appellees and all evidence to the contrary must be disregarded. This Respondents submit is the true proposition of law but it has no application here where the question of the supporting of certain findings of fact by the evidence in the Record is not in issue. The Court of Appeals did not reverse one finding of fact made by the trial court which is material to the issue raised by Petitioner's Petition and Brief but merely reversed the conclusion of law that decedent was not negligent under the circumstances as was decided by the lower court.

> "a. In its opinion the Court of Appeals (R-86) stated the speed of the automobile to be between 45 and 50 miles per hour. The trial judge inferred a much greater speed (R-82), and made a formal finding (No. 6) of excessive speed (R-15) and not under the driver's control (No. 8) (R-16), and that the driver could have avoided the accident (No. 8 and 9) (R-16)."

This is obviously immaterial to this Petition for Writ of Certiorari in that it is conceded by everyone, including the Court of Appeals, that there is no question as to the negligence of the defendants in the case. Petitioner again raises the question of defendant's negligence at page 15 of his Brief:

> "The appellant, as a driver of an automobile, is bound to anticipate that he may meet pedestrians on the highway. He must so operate his car as to prevent injuring them if in the exercise of due care on his part it is possible to do so. *Russell vs. Davis, supra.* (37 P 2nd 536, 539)."

Petitioner states that ths latter quotation is the law in

New Mexico contrary to that determined by the Court of Appeals.

> "The trial judge found as a fact that, if the car had been operated properly the accident would have been avoided (R-16)."

As the Respondent understands the opinion of the Court of Appeals, there is no question as to the negligence of defendant's but the case is decided and the trial court was reversed only on the ground of the contributory negligence of deceased, plaintiff's intestate. Even though Petitioner's quotation from *Russell vs. Davis, supra,* should be the law in New Mexico it has no application here.

Although Petitioner would have the Court believe that the isue here is whether or not the Federal Court must and did apply the law of the state in which the Court sits, the true issue here, if any, is whether or not this Court agrees with the Court of Appeals of the Tenth Circuit in its determination that the fact situation here is such that reasonable men cannot agree that deceased, Petitioner's intestate, was negligent so that the Court can properly follow the law of New Mexico as it did in its original decision, 187 F. 2nd 345, and determine contributory negligence as a matter of law and thus bar Petitioner's recovery.

Respondent's Point I

A Writ of Certiorari Should Be Denied Because This Application Is Not Made in Conformance with the Decisions of this Court as They Have Construed the Meaning of Title 28 USCA Section 1254

Petitioner directs his petition to the United States Court of Appeals, Tenth Circuit, for a Writ of Certiorari in order that this Court may review this cause under the pro-

visions of Title 28 USCA Section 1254. This Section provides in part as follows:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

This Court has held that the purpose of this Section of the Code is to guard against any injurious results which might flow from having nine appellate courts acting independently of each other, and so that cases from these courts could be reviewed by this court and thus insure uniformity of ruling as well as to provide for the disposition of cases whose gravity and importance rendered the action of the tribunal of last resort peculiarly desirable. It was not the purpose of this Section to merely give a defeated party another hearing. *Warner vs. New Orleans,* 1897, 167 US 467, 42 L. Ed. 239, 17 S. Ct. 892; *Magnum Import Co. vs. Coty,* 262 US 159, 67 L. Ed. 922, 43 S. Ct. 531; *Columbus Watch Company vs. Robbins,* 148 US 266, 37 L. Ed. 445, 13 S. Ct. 594. Petitioner has failed to set out any other case from a United States Court of Appeals of any other Circuit where there is a conflict presented with the holding of the Court of Appeals, Tenth Circuit, in the instant case. Respondents' research has disclosed none. Whether this case presents a matter of such gravity and importance that the action of the tribunal of last resort is peculiarly desirable seems doubtful however, respondents are unable to find authority indicating that it would or that it would not. Inasmuch as the petitioner, upon writ of certiorari, has the burden of showing error in the judgment asked to be set aside, it would seem that before the Court would allow this writ to issue, Petitioner should present potent and cogent authority for the granting of the writ under circum-

stances which require merely the review of a question of fact arising in a common-place automobile collision. *Higgins vs. Carr Bros. Company,* 317 US 572, 87 L. Ed. 468, 63 S. Ct. 337; *Walling vs. Jacksonville Paper Company,* 317 US 564, 87 L. Ed. 460, 63 S. Ct. 332. As was stated by Mr. Justice Brewer in his excellent opinion in which he speaks for the Court in *Warner vs. New Orleans, supra*:

> "It is true, power was given to the courts of appeal to certify questions, but it is only 'questions or propositions of law' which they are authorized to certify and such questions must be, as held in this case just cited (referring to *Cross vs. Evans,* 167 U.S. 60) 'distinct questions or propositions of law unmixed with questions of fact or of mixed law and fact'."

The sole question presented by this Petition and Brief is whether or not the facts of the case substantiate the holding of the Court of Appeals, Tenth Circuit, that deceased, Petitioner's intestate was guilty of contributory negligence. This is a question of fact which, under the authorities cited above, this Court will not review.

Conclusion

It is respectfully submitted that there has been no failure or refusal of the Court of Appeals, Tenth Circuit, to follow and abide by the law of New Mexico under the rule of *Erie Railroad Company vs. Thompkins, supra,* as Petitioner contends. Further, Respondents feel that if the United States Supreme Court is to review the facts of every automobile collision case which is decided by the United States Courts of Appeal, it will be so overwhelmed with cases of a factual nature that it must ignore its true

function, to state the law as it is found in the federal jurisdictions.

Respondents, therefore, respectfully submit that the Writ of Certiorari should be denied.

Respectfully submitted,

J. R. Modrall

Counsel for Respondents
Sunshine Building
Albuquerque, New Mexico

VANCE MAUNEY
Of Counsel.